FILED

962054 JUN 26 1997

OFFICE OF THE CLERK

No. 96-___

In The

Supreme Court of the United States

October Term, 1996

EAST COLUMBIA BASIN IRRIGATION DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

ANDREW C. BOHRNSEN
Of Counsel
9 North Post, Suite 550
Spokane, Washington 99201
(509) 838-2688

Attorneys for Petitioner

44 pp

QUESTION PRESENTED FOR REVIEW

Is the United States absolutely immune under the Flood Control Act, 33 U.S.C. 702c, even where there is (1) no causal nexus between the government's negligence and flood control activities; and (2) no significant federal funds were lawfully expended for flood control purposes on the water project where the injuries occurred?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption. The State of Washington was the plaintiff in a related action consolidated before the District Court.

RULE 29.6 LIST

East Columbia Basin Irrigation District has no parent companies or subsidiaries.

TABLE OF CONTENTS

Page

Question Presented for Review i
List of Parties Below ii
Rule 29.6 List ii
Opinions Below 1
Statement of Jurisdiction 1
Statute Involved 2
Statement 2
Reasons for Granting the Petition 6
Conclusion 12

TABLE OF AUTHORITIES

CASES

Bailey v. United States, 35 F.3d 1118 (7th Cir. 1994) 8

Boudreau v. United States, 53 F.3d 81, 83 (5th Cir. 1995), cert. denied, 116 S.Ct. 771 (1996) 7-9

Cantrell v. United States, 89 F.3d 268, 271 (6th Cir. 1996) 7, 8

Dawson v. United States, 894 F.2d 70, 73 (3d Cir. 1990) 7

Exxon Co., U.S.A. v. Sofec, Inc., 116 S.Ct. 1813, 1817-18 (1996) 10

Fisher v. United States Army Corps of Engineers, 31 F.3d 683, 685 (8th Cir. 1994) 7, 8, 9

Fryman v. United States, 901 F.2d 79, 81 (7th Cir.), cert. denied, 498 U.S. 920 (1990) 7, 8, 9

Hayes v. United States, 585 F.2d 701 (4th Cir. 1978) 5, 8

Hiersche v. United States, 503 U.S. 923 (1992) 8

Holt v. United States, 46 F.3d 1000, 1005 (10th Cir. 1995) 7

Lunsford v. United States, 570 F.2d 221, 228 n.13 (8th Cir. 1977) 6

Reese v. South Florida Water Mgt. Dist., 59 F.3d 1128 (1995) 7, 8

State of Washington v. East Columbia Basin Irrigation District, 105 F.3d 517 (9th Cir. 1997) 1, 5-6, 8, 10

United States v. James, 478 U.S. 597 (1986) 6, 9, 11

STATUTES

The Rivers and Harbors Act of 1935, 49 Stat. 1028, 1039 (1935) 3

28 U.S.C. §§ 2671-80, 2401(b) & 1346(b) 2

33 U.S.C. § 702c 2, 4

43 U.S.C. § 485h(a) 3

43 U.S.C. § 485h(b) 3

OTHER

Report on the Columbia Basin Project on the Columbia River, H.R. Doc. No. 172, 79th Cong., 1st Sess. 3, 6 (1945) 4

PETITION FOR WRIT OF CERTIORARI

The Petitioner, East Columbia Basin Irrigation District, respectfully prays that a writ of certiorari issue to review the January 27, 1997, judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of January 27, 1997, *State of Washington v. East Columbia Basin Irrigation District*, No. 96-35163 (9th Cir. Jan. 27, 1997), is reported at 105 F.3d 517 (9th Cir. 1997) and is reprinted at App. 1a. A Petition for Rehearing with a Suggestion for Rehearing In Banc was denied by the Ninth Circuit on April 8, 1997. See App. 11a.

The order of the U.S. District Court for the Eastern District of Washington, Chief Judge Nielsen, presiding, of January 26, 1996, was unreported. See App. 13a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Ninth Circuit of January 27, 1997. A Petition for Rehearing and Suggestion for Rehearing In Banc was denied on April 8, 1997. The Supreme Court has jurisdiction to review cases from the Courts of Appeals under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Flood Control Act of 1928, 33 U.S.C. § 702c, provides in relevant part that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."

STATEMENT

1. This case arose when the East Columbia Basin Irrigation District's [ECBID's] main channel, the East Low Canal, catastrophically failed on July 19, 1992. Escaping water caused damage to surrounding landowners and resulted in the temporary closure of an Interstate Highway. East Low Canal has always been utilized to transport irrigation water to farmers within ECBID's boundaries.

The State of Washington sued ECBID in state court for damages arising from the incident, and the matter was removed to federal court. After exhausting administrative remedies, ECBID complained against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, 2401(b) & 1346(b), and the two cases were consolidated.

ECBID's claim was that the United States was negligent in the construction of the East Low Canal between 1950 and 1953. This negligence resulted in a major break in 1953, at the same location as the 1992 break. The United States then compounded its initial negligence by failing to address construction errors in the repair process causing the later canal failure. For purposes of the cross-motions for summary judgment before the District Court and the appeal before the Ninth Circuit, the United States stipulated that it was negligent in its initial construction and the 1953 repairs, proximately causing the 1992 break.

2. a. East Low Canal was constructed as part of the Columbia Basin Project, initiated with the passage of the

Rivers and Harbors Act of 1935, 49 Stat. 1028, 1039 (1935). Then, as now, the nucleus of the Columbia Basin Project was the construction of Grand Coulee Dam, intended to generate hydro-electric power from water stored in Lake Roosevelt. Separate and distinct from power generation, Congress subsequently saw the opportunity to use the storage facilities for the purpose of bringing water to literally hundreds of thousands of arid acres in eastern Washington State, as well as to expand open navigation on the Columbia River.

Following numerous hearings and the submission of many reports to Congress, the Reclamation Project Act was adopted in 1939. Throughout these legislative deliberations, the sole function for that part of the Columbia Basin Project comprehending ECBID and the East Low Canal was declared to be irrigation. References to flood control were ancillary and concerned only the area of The Dalles, Oregon -- hundreds of miles away from the borders of the Project and maintained by financial appropriations totally unrelated to the Project.

b. In the 1939 Act, Congress placed a condition precedent on the allocation of any funds for reclamation projects: an initial finding of feasibility documented by the Department of Interior. See Act of Aug. 4, 1939, § 9(a), ch. 418, 53 Stat. 1187, 1193, currently codified at 43 U.S.C. § 485h(a) (1997); App. 23a.

To further assure absolute control over the expenditure of federal funds not subject to reimbursement under charges to energy users and irrigation repayment contracts, Congress included section 9(b) in the 1939 Act, which prohibited any allocation designated for flood control unless it was specifically found to be justified and so designated in the feasibility study identified above. See id. § 9(b); 53 Stat. 1194, codified at 43 U.S.C. § 485h(b); App. 25a. So prior to the expenditure of any non-reimbursable funds for flood control within the Columbia Basin Project, there had to be (1) a specific allocation to an identified flood control activity or

facility supported by a finding of feasibility by the Secretary of the Interior, and (2) the Secretary had to demonstrate that the project would be operated in accordance with that allocation for "the identified flood-control purpose." Id.

Pursuant to the requirements of section 9 of the 1939 Act, the Secretary of Interior reported in 1945 that

> The total cost of the irrigation works [in the Columbia Basin Project] consisting of the pumping plant, equalizing reservoir, and distribution system is estimated to be $280,782,180.00 for irrigating 1,029,000 acres. *Those works will serve only one function, irrigation, and their cost is not subject to apportionment. It must be assigned directly to irrigation.*

Report on the Columbia Basin Project on the Columbia River, H.R. Doc. No. 172, 79th Cong., 1st Sess. 3, 6 (1945) (emphasis added).

c. At no time prior to the negligent construction of the East Low Canal was one penny ever expended for flood control on the entire Columbia Basin Project. More significantly, no funds for flood control have been allocated for the construction, operation, or maintenance of any works associated with the East Low Canal, in accordance with the congressionally mandated procedure of section 9 of the 1939 Act.

3. a. In the district court, the United States sought to dismiss ECBID's action under the authority of the Flood Control Act of 1928, 33 U.S.C. § 702c ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."). The district court granted the motion, "based on the expansive immunity accorded § 702(c) by the Ninth Circuit," and despite the "important and significant distinctions" raised by ECBID. App. 21a. The district court ruled that because

the East Low Canal is an integral part of the Columbia Basin Project and that the Project was "at least in part, for flood control purposes." App. 21a, ECBID's damages were (under the Ninth Circuit's "expansive" test) "not wholly unrelated" to "flood waters," and thus immunity attached under § 702c.

b. The Ninth Circuit affirmed, but in so doing acknowledged that it could do so only under its "expansive" interpretation of section 702c, requiring a plaintiff to prove that its damages were "wholly unrelated" to "floods" or "flood waters." The Ninth Circuit conceded that other courts of appeal "have found this standard too broad." 105 F.3d at 519, App. 6a (citing *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978)).

Based on earlier circuit authority, the Court of Appeals rejected ECBID's argument that East Low Canal was not a flood control project within the intelligible meaning of section 702c. The Ninth Circuit held that even if "only a small portion of the project's costs were allocated to flood control," that was enough to satisfy its standard of "not wholly unrelated." 105 F.3d at 520; App. 8a.

In response to ECBID's assertion that no allocation of funds for flood control purposes had been made pursuant to the 1939 Act, the Ninth Circuit laconically "decline[d] to create a new rule that would look to the timing of flood control expenditures rather than to the project's purposes. The 'wholly unrelated' standard requires us to decide only whether an 'act of Congress authoriz[es] expenditure of federal funds for flood control, not when and how such funds have been expended." Id.; App. 9a (citation omitted).

Having held that "[t]he project has flood control as one of its purposes, and the events giving rise to this action are not wholly unrelated to the project[, that] ends our inquiry. We need not determine whether flood control efforts contributed to the flood." Id.; App. 9a. The Ninth Circuit believed that such an analysis of contributing, superseding or intervening causes was a "morass." Id.; App 10a (citing

Lunsford v. United States, 570 F.2d 221, 228 n.13 (8th Cir. 1977)).

c. A Petition for Rehearing with a Suggestion for Rehearing In Banc was denied by the Ninth Circuit on April 8, 1997. See App. 12a. This timely Petition follows.

REASONS FOR GRANTING THE PETITION

This Petition asks the Court to provide a credible construction of the immunity provision of the 1928 Flood Control Act. Since this Court's decision in *United States v. James*, 478 U.S. 597 (1986), extending section 702c immunity to personal injury claims, a growing schism has developed between the courts of appeal. In adhering to what it admits is a "broad" test which gives "expansive" governmental immunity, the Ninth Circuit has now held that the United States is immune from suit even where the waters causing damage are clearly not flood waters flowing from a flood control project. Moreover, the Ninth Circuit simply refused to consider Congress' own characterization of the waters at issue in this case, and declined to soften its "wholly unrelated" rule by reference to superseding causes.

Petitioner submits that the Ninth Circuit's ruling necessitates review for two reasons: (1) in clinging to its "broad" and "expansive" reading of § 702c, it widens an already cavernous split in the circuits; and (2) even if the Ninth Circuit's "wholly unrelated" test is notionally correct, it must be modified where no significant federal funds were expended for flood control purposes.

1. a. There is a sharp split in the circuits as to how properly to interpret section 702c. The Ninth Circuit, in the decision for which review is sought here, frankly acknowledged the division, 105 F.3d at 519 & n.3, App. 6a

("[T]he Supreme Court's failure to resolve the circuit split has been the subject of much discussion and speculation in recent cases."). Other courts have likewise indicated that the discordant jurisprudence for the flood immunity provision of § 702c has become untenable. See *Cantrell v. United States*, 89 F.3d 268, 271 (6th Cir. 1996); *Boudreau v. United States*, 53 F.3d 81, 83 (5th Cir. 1995) ("there is disagreement among the circuits on the application of § 702c."), cert. denied, 116 S.Ct. 771 (1996); *Dawson v. United States*, 894 F.2d 70, 73 (3d Cir. 1990).

The fault-line marking the split between the circuits is, as the Solicitor General has previously acknowledged in filings in this Court, see *Boudreau v. United States*, Brief for the United States in Opposition, at 7 (U.S. No. 95-398) (December 1995), the Ninth Circuit's test of "bar[ring] all claims arising from injuries at flood control projects unless the injuries are *wholly unrelated* to flood control." Id. (original emphasis). This "approach" (as the Solicitor General characterized it) is shared by the Third and Fifth Circuits. See *Dawson*, 894 F.2d at 73; *Boudreau*, 53 F.3d at 84.

On the other side of the divide are those courts that have rejected the Ninth Circuit's "wholly unrelated" test and have required a showing of some sort of nexus between the plaintiff's injuries and the government's flood control activities, before section 702c immunity is invoked. The Fourth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have adopted this approach, and, in so doing, have been sharply critical of the Ninth Circuit precedents. See, e.g., *Cantrell*, 89 F.3d at 271 ("such a sweeping grant of immunity makes little sense in light of the text and purpose of the [Flood Control] Act."); *Reese v. South Florida Water Mgt. Dist.*, 59 F.3d 1128 (1995); *Holt v. United States*, 46 F.3d 1000, 1005 (10th Cir. 1995); *Fisher v. United States Army Corps of Engineers*, 31 F.3d 683, 685 (8th Cir. 1994); *Fryman v. United States*, 901 F.2d 79, 81 (7th Cir.)

(Easterbrook, J.), cert. denied, 498 U.S. 920 (1990); *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978). And if this basic schism in approach is not enough to frustrate a uniform application of § 702c immunity, there is also, as one court described it, "a bewildering array of linguistic tests" which overlay a determination whether an incident involves "flood waters" for the purposes of the 1928 Act. *Cantrell*, 89 F.3d at 272.[1]

b. Petitioner submits that this basic division among the circuits -- the categorical "wholly unrelated" test versus a nexus standard -- is unlikely to narrow. As the citations made above indicate, the tempo of litigation involving the 1928 Act has accelerated. Petitioner is mindful that this Court has had the opportunity to revisit the interpretation of section 702c after its decision in *James*, but has declined to do so. See, e.g., *Hiersche v. United States*, 503 U.S. 923 (1992) (Stevens, J., memo respecting the denial of certiorari). There are, however, compelling reasons for the Court to grant this Petition, even if it were limited to the question of the propriety of the Ninth Circuit's "wholly unrelated" test.

First, there is no doubt that the Ninth Circuit's application of its "broad" and "expansive" grant of immunity under § 702c was dispositive here. The court of appeal as much as said that applying a "nexus" test used in other circuits would have yielded a different result. See 105 F.3d at 519; App. 6-7a. The Ninth Circuit was compelled to acknowledge that an injury caused by the negligence of the

[1] The Sixth Circuit has emphasized whether "an act constituting part or all of the alleged breach of the duty of care was an act undertaken to control flooding." *Cantrell*, 89 F.3d at 269. The Seventh Circuit considers whether a flood control activity "increase[d] the probability of injury." *Fryman*, 901 F.2d at 82; see also *Bailey v. United States*, 35 F.3d 1118 (7th Cir. 1994). The Eighth Circuit has decided on the basis of whether "government control of flood waters was a substantial factor" in causing the injuries. *Fisher*, 31 F.3d at 684. The Eleventh Circuit has framed the inquiry as whether the injury "arose directly out of . . . floodwater control operations." *Reese*, 59 F.3d at 1131. Finally, the Fourth Circuit has focussed on the role of non-flood control activities. See *Hayes*, 585 F.2d at 702.

government in building an *irrigation* canal has only a tangential relation to flood control and § 702c immunity.

Second, nothing in the Ninth Circuit's "wholly unrelated" test is sanctioned by this Court's holding in *James*. *James* was, of course, limited to the question of whether § 702c applies to both personal injury and property damage claims. This Court sensibly ruled that it does, see 478 U.S. at 605, and Petitioner need not (and will not) seek to revisit that question. And while this Court did note that the use of the words "*any* damage" and "liability of *any* kind" in section 702c "undercuts a narrow construction," id. at 604-05, it made clear that the grant of immunity was "from any liability associated with flood control." Id. at 608. Inherent in *James* is the demand that courts find a causal connection between the plaintiff's injury and governmental flood control efforts. Were it otherwise, it would be (as the Seventh Circuit, per Easterbrook, J., has noted) that "*James* was so broadly written that it cannot be applied literally." *Fryman*, 901 F.2d at 81; *Boudreau*, 53 F.3d at 87 (Smith, J., dissenting) ("This passage from *James*, must be construed in light of . . . the plain language of 702(c).").

Finally, while Petitioner is mindful that section 702c cases are truly "fact-intensive" inquiries, the Ninth Circuit's decision requires review because it perpetuates and extends a legal test that is insensible to factual complexity and causal connection. Petitioner will be prepared to argue to this Court that § 702c immunity is properly granted where "government control of flood waters was a substantial factor" in causing the plaintiff's injuries. *Fisher*, 31 F.3d at 684. Embracing this test as the proper construction of section 702c will mean that courts, quite properly, will have to decide causation issues.[2] In insisting on its "wholly unrelated" test, the Ninth

[2] In a slightly different context, this Court has recently ruled that in the application of the general maritime law, proximate cause and superseding cause remain relevant considerations. See *Exxon Co., U.S.A. v. Sofec, Inc.*, 116 S.Ct. 1813, 1817-18 (1996).

Circuit is simply applying a mistaken variant of a causation inquiry, one that needs correction by this Court in order to insure a consistent application of the flood immunity provision.

2. Even if this Court was well-disposed towards the "wholly unrelated" test, it should not countenance the Ninth Circuit's indifference to the fact that no significant federal funds were lawfully expended for flood control purposes on East Low Canal. The district court found that "[i]t is undisputed that the East Low Canal's purpose does not include flood prevention." App. 18a. This finding was left undisturbed on appeal. Instead, the Ninth Circuit held that "[t]he 'wholly unrelated' standard requires us to decide only whether an 'act of Congress authoriz[es] expenditure of federal funds for flood control, not when and how such funds have been expended." 105 F.3d at 520; App. 9a (citation omitted). And, the Ninth Circuit held, even though "only a small portion of the [Columbia Basin] [P]roject's costs were allocated to flood control," id.; App. 8a (about $1 million out of a total $487 million), that nonetheless qualified East Low Canal as a flood control project.

Petitioner disputes whether, prior to 1992 and the events giving rise to this case, *any* funds were properly allocated for flood control purposes, under section 9 of the 1939 Reclamation Project Act. But it is unnecessary for the Court to take judicial notice of that fact in order to rule on this point. What is undoubted is that flood control allocations for the Columbia Basin Project were trivial when compared to those for hydro-electric power generation, navigational improvements, and irrigation. This Court's decision in *James* is strongly suggestive that the rationale for flood immunity is

Like the Ninth Circuit below, 105 F.3d at 520; App. 10a (calling the law of contributing, superseding or intervening causes a "morass"), the Petitioner in *Exxon* sought to "eschew" "the 'confusing maze of common-law proximate cause concepts'", id. at 1818 (quoting Petitioner's Reply Brief), an argument this Court rejected. See id.

that if the government makes "vast expenditures of public funds" for flood control, it is reasonable that it be immune from liability arising from such "dangerous and extensive projects[s]." 478 U.S. at 606-07.

No such expenditures were made here. Before a body of water can be considered a "flood water" for purposes of § 702c, Petitioner submits that significant expenditures must actually have been made, pursuant to law, in establishing or maintaining the body of water for flood control purposes. A significant expenditure does not, by any means, require that the body of water be used exclusively for flood control purposes. Rather, flood control expenditures must be roughly commensurate with allocations for other, non-immune purposes (such as power production, navigation or irrigation). Finally, such flood control expenditures must have been regularly made pursuant to the relevant federal legislation, in this case the 1939 Reclamation Project Act.

3. If the Court is disposed to grant the Petition encompassing the grounds enunciated here, Petitioner will seek a remand for proceedings consistent with (what it trusts will be) a much-needed, uniform interpretation of the government's flood water immunity under section 702c of the 1928 Act.

CONCLUSION

For the foregoing reasons, this Petition ought to be GRANTED.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

ANDREW C. BOHRNSEN
Of Counsel
9 North Post, Suite 550
Spokane, Washington 99201
(509) 838-2688

Attorneys for Petitioner

July 2, 1997

No. 96-___

In The

Supreme Court of the United States

October Term, 1996

EAST COLUMBIA BASIN IRRIGATION DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
EAST COLUMBIA BASIN IRRIGATION DISTRICT; UNITED STATES OF AMERICA,	)	No. 96-35163
	)	D.C. No.
Defendants.	)	CV-94-00118-WFN
	)	
EAST COLUMBIA BASIN IRRIGATION DISTRICT,	)	**OPINION**
	)	
Cross-claimant-Appellant,	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Cross-defendant-Appellee.	)	

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Chief Judge, Presiding

Argued and Submitted
January 10, 1997 -- Seattle, Washington
Filed January 27, 1997

Before: Eugene A. Wright, William C. Canby, Jr., and
A. Wallace Tashima, Circuit Judges
Opinion by Judge Wright

SUMMARY

Torts/Government Law

The court of appeals affirmed a judgment of the district court. The court held that Flood Control Act immunity from an action under the Federal Tort Claims Act applies, despite a proportionally small allocation of costs to flood control in a multi-purpose federal public works project.

The Columbia Basin Project (CBP) has for its purposes energy generation, irrigation, and flood control. Only a small fraction of the cost of the overall project was allocated to flood control. Appellant East Columbia Basin Irrigation District manages the East Low Canal, which is an irrigation channel in the CBP.

The Flood Control Act (FCA) provides that the United States cannot be held liable for damage from floods or flood waters if it is "not wholly unrelated" to a project with flood control as one of its purposes.

In 1992, one of the Canal's retaining walls burst, causing flooding and damage. The District sued under the Federal Tort Claims Act, alleging that the government negligently designed and built the Canal. The district court dismissed the action for lack of subject-matter jurisdiction, citing the government's immunity under the FCA. The District appealed.

[1] The FCA immunizes the government so long as the damage sustained is not wholly unrelated to a project with

flood control as one of its purposes. This broad standard has never been disapproved by the Supreme Court. [2] Immunity applies as long as the plaintiff's damages: (1) are caused by a flood or flood waters (2) from a federal project with flood control as one of its purposes, and (3) are not wholly unrelated to the operation of the project.

[3] The terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control. [4] Under this broad definition, the waters that spilled from the East Low Canal were "flood waters."

[5] The Canal could not be regarded separately from the rest of the CBP to determine whether flood control was among its purposes. [6] There was no legal basis for the argument that the FCA may not apply when only a small portion of the project's costs were allocated to flood control. Immunity applies when flood control is one of the purposes of the project where the flood occurs. It need not be the only, or even the predominant, purpose.

[7] It was not unfair that the government enjoys FCA immunity when it has made such a comparatively small investment in flood control. The legislature has chosen to waive sovereign immunity for certain cases. That it has chosen to retain its immunity where it has used federal dollars to fund massive projects is not inequitable.

[8] The project had flood control as one of its purposes and the events giving rise to the action where not wholly unrelated to the project. It was unnecessary to

determine whether flood control efforts contributed to the flood.

COUNSEL

Andrew C. Bohrnsen, Bohrnsen & Owen, Spokane, Washington, Richard A. Lemargie, Lemargie & Whitaker, Ephrata, Washington, for the defendant-appellant-cross-claimant-appellant.

Irene M. Solet, United States Department of Justice, Washington D.C., for the plaintiff-appellee-cross-defendant-appellee.

OPINION

WRIGHT, Circuit Judge.

BACKGROUND:

The East Low Canal is one of several irrigation channels constructed in the early 1950s by the United States as part of the Columbia Basin Project. The project's combined purposes are: generating energy through a power plant at the Grand Coulee Dam; irrigating the agricultural region south of the Dam; and facilitating flood control and navigation in Oregon by regulating the amount of water released from the Dam. Of the $487,030,228 that the Secretary of the Interior estimated the project would cost, in

1945, only $1 million was allocated to flood control and navigation.[1]

Plaintiff, the East Columbia Basin Irrigation District ("the District"), manages the East Low Canal and surrounding works. In 1992, one of the Canal's retaining walls burst, causing flooding and damage in the region around Moses Lake, Washington. The District sued under the Federal Tort Claims Act, 28 U.S.C. 1346(b) alleging that the government negligently designed and built the Canal. The trial court dismissed the action for lack of subject matter jurisdiction, relying on the government's flood control immunity. We have jurisdiction over the District's appeal pursuant to 28 U.S.C. § 1291 and we affirm.

ANALYSIS:

Flood Control Immunity

A. Standard of Review

A dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) is reviewed de novo. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

[1]The reason for allocating cost among different purposes is that the states must repay the federal government for its power-generating and irrigation expenses. See Reclamation Project Act of 1939, 59 Stat. 1187. The reason is not, as the District argues, that the Secretary is statutorily prohibited from using the project for flood control purposes in the absence of specific authorization.

B. Standard for Immunity

[1] The Flood Control Act, 33 U.S.C. § 702c, provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."[2] This circuit interprets § 702c to immunize the government so long as the damage sustained is "not wholly unrelated" to a project with flood control as one of its purposes. *McCarthy*, 850 F.2d at 561; *Morici Corp. v. United States*, 681 F.2d 645, 648 (9th Cir. 1982). Some circuits have found this standard too broad, *see Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978), but it is unquestionably the law of this circuit and, contrary to the District's argument, has never been disapproved by the Supreme Court.[3]

[2]Although it was enacted later, the FTCA does not override or repeal this immunity provision. *Aetna Ins. Co. v. United States*, 628 F.2d 1201 (9th Cir. 1980).

[3]The District erroneously contends that *United States v. James*, 478 U.S. 597 (1986), favored the Fourth Circuit's approach in *Hayes* over this circuit's "not wholly unrelated" approach in *Morici*. In fact, the issue was neither presented nor decided in *James*. In fact, the Supreme Court's failure to resolve the circuit split has been the subject of much discussion and speculation in recent cases. *See Hiersche v. United States*, 503 U.S. 923, 924 (1992) (Stevens, J., commenting on the Court's denial of certiorari in case that would have required it to resolve the inter-circuit conflict); *Boudreau v. United States*, 53 F.3d 81, 85 (5th Cir. 1995) (discussing footnote 7 in *James*, which cites both *Hayes* and *Morici* without acknowledging their inconsistency); *Dawson v. United States*, 894 F.2d 70, 73 (3d Cir. 1990) (same); *Pueblo de Cochiti v. United States*, 647 F. Supp. 538, 541 (D.N.M. 1986) (same).

[2] Section 702c immunity therefore applies as long as plaintiff's damages: (1) are caused by a flood or flood waters (2) from a federal project with flood control as one of its purposes and (3) are "not wholly unrelated" to the operation of the project.

1. Flood Water

[3] "It is clear from § 702c's plain language that the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." *James*, 478 U.S. at 605; *see also Reese v. South Florida Water Mgt. Dist.*, 59 F.3d 1128, 1130 (11th Cir. 1995) ("Even assuming the water was released 'solely for' or 'only for' irrigation and other purposes, it was water contained within a multi-purpose federal flood control project, and *James* clearly held that all water in a federal flood control project is considered 'flood water' if it is part of the project.").

[4] Under this broad definition, the waters that spilled from the East Low Canal were "flood waters." That they might not have been considered flood water under state law is irrelevant.

2. Flood Control Purpose

The statutes relating to construction of the Columbia Basin Project, the Committee Bill that preceded the statutes, the letter of the Secretary of the Interior, and affidavits supplied by the government all establish that flood control is

one of the Project's purposes.[4] The District does not present any contrary evidence.

[5] The District urges us to regard the Canal separately from the rest of the Columbia Basin Project for the purposes of this inquiry. *Morici* prevents us from doing so. It concerned flooding of the Trinity River Diversion of the Central Valley Project in California. Although the Trinity River portion was devoted solely to irrigation purposes, we looked to the purposes of the Central Valley Project as a whole to determine whether flood control was among them. *Morici*, 681 F.2d at 648; *see also Morici v. United States*, 491 F. Supp. 466, 489-90 (E.D. Cal. 1980) (describing facts in detail).

[6] The District also argues that § 702c may not apply where, as here, only a small portion of the project's costs were allocated to flood control. There is no legal basis for its argument. It is well settled that § 702c immunity applies when flood control is one of the purposes of the project where the flood occurs. It need not be the only, or even the predominant, purpose. *See McCarthy*, 850 F.2d at 562; *Morici*, 681 F.2d at 647; *Aetna v. United States*, 628 F.2d 1201, 1203 (9th Cir. 1980); *McClaskey v. United States*, 386 F.2d 807 (9th Cir. 1967).

[4] *See* House Committee Bill, H.R. 7446, 72d Cong., 1st Sess. (1932); 49 Stat. 1028 (1935); 50 Stat. 208 (1937); 53 Stat. 1187 (1939); 57 Stat. 14 (1943); Letter of the Secretary of the Interior transmitting the Joint Report on the Columbia Basin Project, House Document No. 172, 79th Cong., 1st Sess. (1945); Gray Declaration; Yribar Declaration.

Attempting to distinguish this case based on the proportion of costs allocated to flood control would unnecessarily complicate the law. It also would contravene the plain purposes of the statute: "[T]he sweeping language of § 702c was no drafting inadvertence. Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the government from 'any' liability associated with flood control." *James*, 478 U.S. at 608.

[7] We do not regard it as unfair that the government enjoys § 702c immunity when it has made such a comparatively small investment in flood control. By its grace, the legislature has chosen to waive the government's sovereign immunity for certain cases. That it has chosen to retain its immunity where, as here, it has used federal dollars to fund massive hydrological projects, does not strike us as inequitable.

Finally, we decline to create a new rule that would look to the timing of flood control expenditures rather than to the project's purposes. The "wholly unrelated" standard requires us to decide only whether an "act of Congress authoriz[es] expenditure of federal funds for flood control," *Peterson v. United States*, 367 F.2d 271, 271 (9th Cir. 1966), not when and how such funds have been expended.

3. Damage "Not Wholly Unrelated" to Project

[8] The project has flood control as one of its purposes, and the events giving rise to this action were not wholly unrelated to the project. This ends our inquiry. We need not determine whether flood control efforts contributed to the flood. *See Morici*, 681 F.2d at 648 (holding that "the relationship between the flooding and a project

Congressionally authorized for flood control . . . is the controlling factor"); *Aetna*, 628 F.2d at 1204 (refusing to venture "into the morass of 'contributing causes,' 'superseding causes,' and 'intervening causes'") (quoting *Lunsford v. United States*, 570 F.2d 221, 228 n. 13 (8th Cir. 1977)).[5]

CONCLUSION

We affirm the dismissal of this action for lack of subject matter jurisdiction.

AFFIRMED.

[5]We need not address the government's alternative argument that Washington's statute of repose bars the action.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON Plaintiff, v. EAST COLUMBIA BASIN IRRIGATION DISTRICT; UNITED STATES OF AMERICA, Defendants.	)	No. 96-35163 D.C. No. CV-94-00118-WFN
EAST COLUMBIA BASIN IRRIGATION DISTRICT, Cross-Claimant-Appellant, v. UNITED STATES OF AMERICA, Cross-Defendant-Appellee.	)	ORDER

Before: WRIGHT, CANBY and TASHIMA, Circuit Judges.

The panel has voted to deny the petition for rehearing and Judge Tashima has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON Plaintiff, v. EAST COLUMBIA BASIN IRRIGATION DISTRICT; UNITED STATES GOVERNMENT, Defendants.	)	No. CS-94-0071-WFN **ORDER**
EAST COLUMBIA BASIN IRRIGATION DISTRICT, Cross-Complainant, v. UNITED STATES GOVERNMENT, Respondent.	)	

Pending before the Court is Defendant United States' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or, in the alternative, for Summary Judgment pursuant to Rule 56(b). East Columbia Basin Irrigation District's [ECBID] cause of action against the United States, and the State of Washington's cause of action against ECBID, were consolidated on June 24, 1994.

BACKGROUND

This is a tort action brought by ECBID to recover damages suffered in 1992 when the East Low Canal failed near Moses Lake, Washington. The escaping water flooded the surrounding property and caused Interstate 90 to close temporarily. The failure resulted in slightly less than $2 million in property damage incurred by ECBID in effecting repairs to the facility and surrounding lands, reparations for lost crops, and other claims for damage to highways and a variety of other physical structures.

ECBID exhausted its administrative remedies and commenced this action against the United States under the Federal Tort Claims Act [FTCA], 28 U.S.C. §§ 2671-80, 4201(b), and 1346(b). ECBID alleges that the failure was proximately caused by the negligent construction of, and repairs to, the East Low Canal by the Bureau of Reclamation, acting by and through its employees. Complaint, ¶ 2.4.

The United States' Motion to Dismiss is premised on two statutes: (a) the Washington Builder's Immunity statute, RCW 4.16.300-310, which is made applicable to the United States by the FTCA, and (b) the Federal Flood Immunity statute, 33 U.S.C. § 702(c), which immunizes the United States from liability for any damages from flood waters at any place.

ECBID has filed a Cross Motion for Summary Judgment requesting that the Court strike both affirmative defenses as a matter of law and order the parties to proceed to trial on the issues of negligence and damages. The State of Washington joins in ECBID's opposition to the United

States' Motion for Dismissal as well as ECBID's Cross-Motion for Summary Judgment.

II. DISCUSSION

A. Rule 12(b)(6).

Fed. R. Civ. P. 12(b)(6) provides for dismissal of causes of action for "failure to state a claim upon which relief can be granted . . . ." Fed. R. Civ. P. 12(b)(6). The issue is not whether ECBID is likely to succeed on the merits, but only if the complaint is legally sufficient to entitle ECBID to proceed beyond the pleadings in an attempt to establish its claim. *De La Cruz v. Tormey*, 582 F.2d 45, 58 (9th Cir.1978), *cert. denied*, 441 U.S. 965 (1979).

ECBID's material allegations in the Complaint must be accepted as true and the Complaint is construed in the light most favorable to them. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). The district court's dismissal is affirmed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

B. FTCA Immunity Under the Flood Control Act of 1928.

Section 702(c) of Title 33, United States Code, states:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.

The purpose of this immunity was to allow the Government to engage in flood control projects without incurring additional monetary liability for floods that occur despite government flood control efforts. *Peterson v. United States*, 367 F.2d 271, 275-76 (9th Cir. 1967). Subsequent case law grants broad protections for the United States via § 702(c). *United States v. James*, 478 U.S. 597, 608 (1986) ("[T]he sweeping language of § 702(c) was no drafting inadvertence. Congress clearly sought to ensure beyond doubt that the sovereign immunity would protect the government from 'any' liability associated with flood control.") The Supreme Court observed that § 702(c)'s protection from liability was stated in the "broadest and most emphatic language." *Id.* The Supreme Court's broad application of immunity under § 702(c) is consistent with Ninth Circuit law. *See, e.g., Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982). Indeed, as both parties note in their briefing, the Ninth Circuit has a particularly expansive view of 702(c) immunity.

It is undisputed that the Columbia Basin Project was initially created with the enactment of the Rivers and Harbors Act which authorized the construction of the Grand Coulee Dam and its related works. Rivers and Harbors Act of August 30, 1993, 489 Stat. 1039-40. The legislation stated in relevant part:

> That **for the purpose of controlling floods**, improving navigation, regulating the flow of streams of the United States, providing for storage and for the delivery of the stored water thereof, for the reclamation of public lands and Indian reservations, and other beneficial uses, and for the generation of electric energy as a means of financially aiding and assisting

> such undertakings, the projects known as . . . "Grand Coulee Dam" on the Columbia River are hereby authorized and adopted, and all contracts and agreements which have been executed in connection therewith are hereby validated and ratified, **and the President, acting through such agents as he may designate, is hereby authorized to construct, operate, and maintain dams, structures, canals, and individual works necessary to such projects**, and in connection therewith to make and enter into any and all necessary contracts including contracts amendatory to or supplemental to those hereby validated and ratified.

49 Stat. 1039-40. Obviously, flood control was a significant purpose behind the Act.

The enactment of the Columbia Basin Project Act in 1943, 57 Stat. 14, codified at 16 U.S.C. § 835 **et seq.**, renamed the project to the "Columbia Basin Project." A brief history of the Columbia Basin Project is presented in *Israel v. Morton*, 549 F.2d 128, 130 (9th Cir. 1977). The section of the East Low Canal which is the subject of these proceedings is a portion of the irrigation works of the Columbia Basin Project.

The East Low Canal was designed in the late 1940s by Bureau of Reclamation personnel and constructed by the United States in the early 1950s. The Bureau operated and maintained the East Low Canal until 1969 at which time ECBID, pursuant to contract with the United States, assumed

those responsibilities. ECBID now operates and maintains the East Low Canal.

Flood control within the Columbia Basin Project is accomplished by coordinating the Bureau's activities with the U.S. Army Corps of Engineers to maintain sufficient space in Franklin Roosevelt Lake to stabilize the flow of the Columbia River at The Dalles. Gray Declaration, ¶ 7. That lake is the source of irrigation water which flows through the East Low Canal. *Id.* The East Low Canal is roughly 87 miles long with a carrying capacity of 4,500 cubic feet of water per second, and serves an important function as part of the Project's extensive irrigation system which supplies water to over 557,000 platted acres. *Id.* It is undisputed that the East Low Canal's purpose does not include flood prevention.

As an initial matter, the water damage at issue here clearly meets the definition of "flood" for purposes of § 702(c). *Stilver v. United States*, 204 F. Supp. 477, 485 (N.D. Cal. 1962) ("flood" exists as a matter of law when water inundates "an area of the surface of the earth where it ordinarily would not be expected"), *aff'd*, 332 F.2d 204 (9th Cir. 1964), *cert. denied*, 379 U.S. 922 (1964); *Morici Corp. v. United States*, 491 F. Supp. 466 (E.D. Cal. 1980) (§ 702(c) applies to seepage waters percolating through the ground), *aff'd*, 681 F.2d 645 (9th Cir. 1982). The fact that the offending water was intended solely for irrigation purposes is of no consequence. "[I]n *Morici* and then *McCarthy* the [Ninth Circuit] expressly rejected the 'notion that the applicability of the immunity provision in cases involving multi-purpose projects depends upon the particular use to which the project was being put when the negligence occurred.'" *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1439 (E.D. Cal. 1995) (quoting *McCarthy v.*

United States, 850 F.2d 558, 562 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

The Ninth Circuit has addressed a factual setting quite similar to the one presented here. *Morici*, 681 F.2d 645. In *Morici*, flooding was caused by seepage from the Trinity River Diversion in California. The Trinity River Diversion, like East Low Canal, was built for irrigation purposes, not flood control purposes. The Trinity River Diversion was, however, a section of the "Central Valley Project" which, like the Columbia Basin Project, had flood control as a specific statutory objective. The district court stated that:

> Section 702(c) immunizes the United States from liability for damages caused by floods deriving from the operation of a multi-purpose river project which has, as one of its purposes, flood control, when the actions giving rise to the damage were undertaken in furtherance of any one of the authorized purposes of the project. This immunity clothes not only the facilities of the multi-purpose Central Valley Project which were specifically authorized and designed in part for flood control, but also those other facilities, such as the Trinity River Diversion which are an integral and essential part of the project even though not specifically intended to further a flood control purpose because the Central Valley Project is operated as an integrated whole in furtherance of its many authorized purposes.

Id. at 492-93. The Ninth Circuit affirmed, and provided the standard by which this Court must consider the Government's Motion for Dismissal:

> Even if the project was being operated at the time of the negligence for a purpose other than flood control, **the operation that caused the damage was not 'wholly unrelated' to a Congressionally authorized flood control project.** It is the relationship between the flooding and a project authorized for flood control which is the controlling factor.

Morici, 681 F.2d at 648 (emphasis added); *McCarthy*, 850 F.2d at 562.

The issue before the Court, therefore, is whether the flood damage in the instant action is "wholly unrelated" to a Congressional Act authorizing federal funds for flood control purposes. Or, stated another way, "(s)o long as a project is authorized by Congress for flood control purposes, and the damage or injury is related to the use of that project, immunity continues to attach." *McCarthy*, 850 F.2d at 562.

The Plaintiff argues that the East Low Canal is wholly unrelated to the Columbia Basin Project because the East Low Canal was "legislatively segregated" from the Columbia Basin Project, and was intended to serve only in an irrigation capacity. According to the Plaintiff, the relevant portion of the East Low Canal has never served any flood control purposes nor has the construction costs of this section of the canal benefitted from any non-reimbursable flood control allocation of costs. ECBID asserts that these facts make this case factually distinguishable from the numerous cases cited

by the Government which outlines the sweeping immunity provided by § 702(c).[1]

Although ECBID raises important and significant distinctions, this Court finds these distinctions insufficient in light of the expansive immunity accorded § 702(c) by the Ninth Circuit. Under the factual setting established above, this Court cannot find that the East Low Canal is "wholly unrelated" to the Columbia Basin Project. Rather, this Court finds that the Columbia Basin Project was authorized by Congress, at least in part, for flood control purposes and that the East Low Canal is an integral part of the Columbia Basin Project.

Because this Court finds the Motion to Dismiss to be determinative of this matter, the Court does not reach the issue regarding Washington Builder's Immunity. Accordingly,

[1]ECBID cites an unreported decision, Kennewick Irrig. Dist. v. United States, C-80-482-SPM, as support for its position, and briefs this case at length. ECBID attempts to justify this citation by stating that the case "represents the most current visit to the issue of flood control by the federal court for the Eastern District of the State of Washington." ECBID's Responsive Memorandum of Authorities to Reply Brief, p. 3. As an initial matter, this decision does not represent the latest discussion of this issue by the Eastern District of Washington. Rather, as the Government points out, Senior Judge Quackenbush considered § 702(c) immunity in a more recent case. *Crowley Marine Services, Inc. v. FEDNAV Ltd.*, CS-94-0178-JLQ. More importantly, however, the Local Rules of the Eastern District of Washington clearly state that "unpublished decisions may not be cited." Local Rule 7(g)(2). Accordingly, the unpublished decision cited by ECBID has not been considered by this Court in its determination of this action.

IT IS ORDERED that:

1. The United States' Motion to Dismiss, **Ct. Rec. 13-1**, is **GRANTED**.

2. The United States' Motion in the Alternative for Summary Judgment, **Ct. Rec. 13-2**, is **DISMISSED AS MOOT**.

3. EDBID's Cross-Motion for Summary Judgment, **Ct. Rec. 29**, is **DENIED**.

4. The State of Washington's Motion to Control Trial, **Ct. Rec. 36**, is **DISMISSED AS MOOT**.

The Clerk is directed to file this Order and provide copies to counsel and to **CLOSE** this file.

DATED this 26th day of January, 1996.

/s/
WM. FREMMING NIELSEN
CHIEF UNITED STATES
DISTRICT COURT JUDGE

43 U.S.C. § 485h

§ 485h. New projects; sale of water and electric power; lease of power privileges

(a) Findings of Secretary

No expenditures for the construction of any new project, new division of a project, or new supplemental works on a project shall be made, nor shall estimates be submitted therefor, by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on --

(1) the engineering feasibility of the proposed construction;

(2) the estimated cost of the proposed construction;

(3) the part of the estimated cost which can properly be allocated to irrigation and probably be repaid by the water users;

(4) the part of the estimated cost which can be allocated to power and probably be returned to the United States in net power revenues;

(5) the part of the estimated cost which can properly be allocated to municipal water supply or other miscellaneous purposes and probably be returned to the United States.

If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply or other miscellaneous purposes found by the Secretary to be proper, together with any allocation to flood control or navigation made under subsection (b) of this section, equal

the total estimated cost of construction as determined by the Secretary, then the new project, new division of a project, or supplemental works on a project, covered by his findings, shall be deemed authorized and may be undertaken by the Secretary. If all such allocations do not equal said total estimated cost, then said new project, new division, or new supplemental works may be undertaken by the Secretary only after provision therefor has been made by Act of Congress enacted after the Secretary has submitted to the President and the Congress the report and findings involved.

43 U.S.C. § 485h

§ 485h. New projects; sale of water and electric power; lease of power privileges

(b) Allocation of part of cost to flood control or navication

In connection with any new project, new division of a project, or supplemental works on a project there may be allocated to flood control or navigation the part of said total estimated cost which the Secretary may find to be proper. Items for any such allocations made in connection with projects which may be undertaken pursuant to subsection (a) of this section shall be included in the estimates of appropriations submitted by the Secretary for said projects, and funds for such portions of the projects shall not become available except as directly appropriated or allocated to the Department of the Inteiror. In connection with the making of such an allocation, the Secretary shall consult with the Chief of Engineers and the Secretary of the Army, and may perform any of the necessary investigations or studies under a cooperative agreement with the Secretary of the Army. In the event of such an allocation the Secretary of the Interior shall operate the project for purposes of flood control or navigation, to the extent justified by said allocation therefor.